Supreme Court, U.S.
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No. 01-1133

IN THE

Supreme Court of the United States

BRENDA O. SINGER, *et al.*,

Petitioners,

v.

CITY OF ALABASTER, ALABAMA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

CITY OF ALABASTER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE CITY OF ALABASTER, ALABAMA COULD PERMIT THE PETITIONERS TO VOTE IN THE CITY'S WARD 1 COUNCIL ELECTION WITHOUT HAVING RECEIVED PRECLEARANCE PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973c, AND PARTICULARLY, WHERE THE UNITED STATES ATTORNEY GENERAL EXPRESSLY OBJECTED TO THE PETITIONERS' PARTICIPATION IN SAID ELECTION.

II. WHETHER THE SUPREME COURT OF ALABAMA VIOLATED FEDERAL LAW IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONERS' LAWSUIT.

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STATEMENT OF JURISDICTION

The Supreme Court of Alabama followed well-established federal precedent in recognizing the mandates of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and declining subject-matter jurisdiction of a voting change that had not received preclearance. Rule 10(b) and (c) of the Rules of the Supreme Court of the United States direct that the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Material Facts.

The City of Alabaster, a municipal corporation located in Shelby County, Alabama, conducted its regularly scheduled municipal elections on August 22, 2000, along with other municipalities in Alabama.

Prior to the elections, the City requested administrative preclearance from the United States Attorney General for a number of parcels of property the City had previously annexed. On July 10, 2000, the Attorney General granted preclearance to sixteen (16) annexations and one (l) deannexation, but objected to forty-two (42) annexations. C. 24-27, 36-39. On August 16, 2000, the Attorney General granted

unrestricted preclearance to forty (40) of the annexations, but granted preclearance with right to participate in only the mayoral election for two (2) other annexed areas lying in the Weatherly Subdivision, wherein the petitioners reside. C.28-32, 40-44. The Attorney General expressly objected to persons living in these two areas from participating in the Ward 1 council election, as had been sought by the City, due to concerns that the voting change might have an unlawful retrogressive discriminatory effect on minority citizens. C.28-32, 40-44.

With the municipal elections at hand and the ballots printed, the City proposed allowing the affected Weatherly residents vote at a separate machine so that their mayoral votes could be counted, and their preference for Ward 1 council member could be recorded in the event of a contest, challenge, or appeal; the City advised that it would not (and could not) certify the results as to the Weatherly residents' vote in the council election, at least without some appropriate court order. C. 81-82. Respondent Bobby Lee Harris, an African-American candidate, received the most legal, certified votes in the Ward 1 council election, but less total votes than his white opponent if the unofficial ballots of the affected Weatherly residents were allowed. Resp. App. 4a-5a; C.4-5, 21.

Respondent Bobby Lee Harris was declared and certified as the winner of the Ward 1 council election.

The petitioners also allege that the City council met in secret session prior to the election, in violation of the Alabama Open Meetings law, but this allegation was denied in the Answer as being absolutely untrue. C. 72. This issue was never raised at the trial court motion hearing, and no significant argument has been made concerning this contention in the petitioners' appellate briefs.

B. Proceedings in Lower Courts.

The petitioners filed a Complaint and Statement to Contest Municipal Election with the Circuit Court of Shelby County on August 28, 2000. C. 3-15. The Complaint alleged that the City of Alabaster wrongly failed to count certain votes in the August 22, 2000, Ward 1 council election, which were cast by persons in two annexed areas of the Weatherly Subdivision. The petitioners claimed the City rejected legal votes and disenfranchised the said affected voters, and claimed various statutory and constitutional violations. The petitioners also filed affidavits contesting the election on the basis of, Section 11-46-140(a)(4), Ala. Code 1975. C. 10-15. The Complaint sought to have the Circuit Court

compel the City to recount the votes, and re-certify the Ward 1 council election using the contested votes, and also enjoin the certified winner, respondent Bobby Lee Harris, from taking office.

The City of Alabaster, Alabama, and Steve Rauch, in his official capacity as Mayor, filed an Answer and Motion to Dismiss on September 8, 2000. C.21-44. The City and Mayor Rauch responded that those persons casting the contested votes lived in an area of the City that had not received appropriate preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and the City was precluded by federal law from counting the said votes. The said respondents submitted copies of two letters from the United States Department of Justice dated July 10, 2000, and August 16, 2000, wherein the United States Attorney General objected to the City's request to authorize the practice sought by the petitioners, i.e., allowing persons residing in the two Weatherly areas to vote in the Ward 1 council election. C.24-32, 36-44. The respondents denied that the Circuit Court had jurisdiction to decide this issue.

Respondent Bobby Lee Harris, the certified winner of the Ward 1 council election, also filed an Answer with motion to dismiss therein, on September 11, 2000. A Motion and Memorandum of Law was filed

by the United States Attorney General seeking to participate as Amicus Curiae on September 18, 2000. The Circuit Court granted the motion of the Attorney General. C.109.

The Circuit Court of Shelby County conducted a hearing on the motions to dismiss on September 18, 2000, with counsel for all parties present, including counsel for the United States Attorney General. On September 22, 2000, the Circuit Court entered an order granting the respondents' motions to dismiss. C.109-111. The trial court determined that the relief sought by the petitioners would violate clearly established federal law, and noted that the Alabama Supreme Court had recognized such. Resp. App. 17a-19a. The petitioners filed their state court Notice of Appeal on October 5, 2000.

The Supreme Court of Alabama affirmed the order of dismissal on November 9, 2001 on the basis of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, and the many U. S. Supreme Court and federal appellate decisions interpreting such. Resp. App. 1a-16a. The petitioners then filed their Petition for Writ of Certiorari with this Court.

ARGUMENT

I. THE CITY OF ALABASTER COULD NOT PERMIT THE PETITIONERS TO VOTE IN THE WARD 1 COUNCIL ELECTION WITHOUT RECEIVING PRECLEARANCE PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 42 U.S.C. §1973c, AND PARTICULARLY, WHERE THE UNITED STATES ATTORNEY GENERAL EXPRESSLY OBJECTED TO THE PETITIONERS' PARTICIPATION IN SAID ELECTION.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, requires that all applicable jurisdictions receive preclearance from the United States Attorney General or the United States District Court for the District of Columbia before enacting any voting change. In United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978), the United States Supreme Court recognized that municipalities and political subdivisions in the State of Alabama, which include the City of Alabaster, are subject to the mandates of Section 5.

The U. S. Supreme Court has emphatically declared that "a jurisdiction subject to Section 5's requirements must either attain judicial or administrative preclearance before implementing a voting change. No new voting practice is enforceable unless the covered jurisdiction has

succeeded in obtaining preclearance." Lopez v. Monterey County, California, 519 U.S. 9, 20, 117 S. Ct. 340, 347, 136 L. Ed 2d 273 (1996); Clark v. Roemer, 500 U.S. 646, 648-649, 111 S. Ct. 2096, 2101, 114 L. Ed 2d 641 (1991). "If a voting change subject to Section 5 has not been precleared, Section 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." Lopez, 519 U. S. at 20, 117 S. Ct. At 347.

The Supreme Court further recognized that "Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process. Congress chose to accomplish this purpose by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court of the District of Columbia." Lopez, 519 U.S. at 23, 117 S. Ct. at 348.

The United States Supreme Court has made clear that preclearance must be obtained regardless of the complications, or effect on voting of persons within the affected areas. A voting change simply cannot be implemented by a covered jurisdiction unless Section 5 preclearance is received.

In Lopez vs. Monterey County, California, supra, the Court ruled that the district court should not have ordered an unprecleared at-large election, despite concerns that an injunction would leave the county without an election system. Monterey County had organized its municipal and non-municipal court districts in accordance with a number of state constitutional and statutory enactments over a period of years between 1972 and 1983. Elections were held during those years, as well as through 1990, but the county never submitted any of its consolidated ordinances for preclearance. Lopez, 519 U. S. at 13, 117 S. Ct. at 344. Litigation ensued between Hispanic plaintiffs, and the County and State, with concerted efforts at settlement, and attempts by the County to amend the State Constitution in ways that would not conflict with the Voting Rights Act. The District Court ordered the County to conduct elections under an unprecleared, election plan, apparently pursuant to its remedial equitable authority. Lopez, 519 U. S. at 15-17,21, 117 S. Ct. at 345-346, 448.

The Supreme Court reviewed the matter and acknowledged that there might be no way for the County to go back to the 1968 plan, and further recognized that enjoining the election could possibly leave the

County without any judicial election system. The Court noted that the parties seemed unable to fashion an election plan that did not violate the California Constitution, and the State had vigorously opposed all of the proposals as violative of State law. Lopez, 519 U.S. at 22-23, 117 S. Ct. at 348. Nonetheless, the Court declared that compliance with Section 5 was mandatory, and Monterey County must obtain preclearance from the Attorney General or District Court of the District of Columbia before the voting changes could be implemented.

In Clark v. Roemer, 500 U.S. 646, 111 S. Ct. 2096, 114 L. Ed 2d 691 (1991), suit was filed challenging the validity of Louisiana's multi member at-large electoral scheme for a number of appellate, district and family court judges. A federal district court in Louisiana entered an order authorizing elections to proceed for judgeships which had not received preclearance. The United States Supreme Court reversed and ordered that the preclearance requirements of Section 5 be observed. The Court stated that "Congress required each jurisdiction subject to Section 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes." Clark, 500 U.S. at 658, 111 S. Ct. at 2104. The Court observed that Louisiana's

predicament was not such an exigency as to invoke equitable principles justifying the election to proceed. Clark, 500 U.S. at 654-655, 111 S. Ct. at 2102. See also Lopez, 519 U.S. at 21-22, 117 S. Ct. at 348.

The Alabama Supreme Court likewise has acknowledged that "Section 5 of the Voting Rights Act of 1965, requires that states covered by the Act obtain prior clearance before proposed changes can be put into effect." Dennis v. Pendley, 518 So. 2d 688 (Ala. 1987); Griggs v. Bennett, 710 So. 2d 411, 412, n. 3 (Ala. 1998). The Alabama Supreme Court has recognized that "cases involving the interpretation of the preclearance requirements of Section 5 of the federal Voting Rights Act are within the exclusive jurisdiction of the federal courts." Mitchell v. City of Prichard, 538 So. 2d 1, 2 (Ala. 1988).

In this case, the Alabama Supreme Court reaffirmed the exclusive federal jurisdiction of the preclearance requirements of Section 5. Resp. App. 6a. The Court noted that the U. S. Attorney General had objected to the City's inclusion in Ward 1 of the areas where the petitioners live. Consequently, authorizing a recount to include the votes of persons residing in the unprecleared areas, e.g., the petitioners, would necessarily contravene the Attorney General's objection, which is

precisely something Section 5 permits only federal courts to do. Resp. App. 9a. The Court reasoned that it could not authorize the requested relief.

The Alabama Supreme Court also opined that it could not nullify the election and delay a second vote because that also involved the application of Section 5. Resp. App. 9a-11a. The Court cited Allen v. State Board of Elections, 393 U. S. 544, 565-566, 89 S. Ct. 817 (1969), and NAACP v. Hampton County Election Commission, 470 U. S. 166, 105 S. Ct. 1128 (1985). The latter case specifically held that changes regarding the date of an election require preclearance. Hampton County, 470 U. S. at 178-179, 181-183, 105 S. Ct. at 1135, 1137-1138. As stated therein, "Appellees' use of an August filing period in conjunction with a March election, and the setting of the March election date itself, were changes that should have been submitted to the Attorney General under § 5." Hampton County, 470 U.S. at 182, 105 S. Ct. at 1137.

The petitioners nonetheless contend that they have an absolute right to vote in municipal elections despite the fact that preclearance has not been granted in this matter. They contend they had legal votes which were not counted. The petitioners are simply wrong. The petitioners were

not legal voters for this election because the appropriate federal authorities had not authorized preclearance pursuant to Section 5.

The City's annexation of residential property changed the boundaries and population of its existing wards, and the City in general. Increasing the number of people and geographical area of the municipality implicates Section 5. Pursuant to 42 U.S.C. § 1973c, and clearly defined U. S. Supreme Court decisions, jurisdictions covered by the requirements of Section 5 may not legally enact any change in voting practice unless and until they receive the requisite preclearance. This rule is straight-forward. The U. S. Supreme Court has definitively held that annexations are covered by Section 5. Perkins v. Matthews, 400 U.S. 379, 388-389, 91 S. Ct. 431, 437 (1971); City of Pleasant Grove v. United States, 479 U.S. 462, 467-468, 107 S. Ct. 794, 798, 93 L. Ed 2d 866 (1987). The Court has also held that changes in the boundaries of election districts are covered by Section 5. Georgia v. United States, 411 U. S. 521, 531-532, 93 S. Ct. 1702, 1706, 36 L. Ed 2d 472 (1973). It is undisputed that the requirements of Section 5 are constitutional.

In the event the City of Alabaster had allowed the certification of the contested votes, without receiving preclearance, the United States or

adversely affected private plaintiffs could have immediately brought an enforcement action and obtained an injunction. Section 5 plaintiffs are entitled to an injunction prohibiting implementation of a voting change that has not been precleared. Lopez, 519 U.S. at 20, 117 S. Ct. at 347. Further, under the Supremacy Clause of the U. S. Constitution, Article VI, clause 2, state courts lack jurisdiction to grant relief which would circumvent the preclearance requirements of Section 5. Hathorn v. Lovorn, 457 U. S. 255, 269-270, 102 S. Ct. 2421, 2430, 72 L. Ed 2d 824 (1982).

If the trial court had for some reason enjoined the winning candidate, Bobby Lee Harris, from taking office, and ordered a new Ward 1 council election, the petitioners would still not be able to vote in the election. The petitioners cannot affect the Ward 1 election, which is the relief they seek, and consequently, no benefit would be gained by the petitioners from respondent Harris being enjoined from taking office. The same pool of people would still vote in a new Ward 1 election.

Pursuant to Section 11-46-21, Ala. Code 1975, the City held its municipal elections on the fourth Tuesday in August, 2000, in

accordance with the statutory authority for such. The City could not certify illegal votes cast by those persons living in the two annexed areas which were subject to the Attorney General's August 16, 2000 objection. The City had no choice but to comply with federal law under Section 5, and the Attorney General's objection. If the City had permitted the petitioners and similarly situated persons to vote in the August 22 election, and thereby attempted to effect the voting changes despite the Attorney General's objection, a successful Section 5 enforcement or injunction suit would likely have been brought in federal court.

The petitioners argue that the election could have been postponed for an indefinite period of time until the Attorney General finally conceded and approved the City's request for them and others to become a part of Ward 1. The Attorney General made absolutely clear, however, that inclusion of the contested voters would cause an unlawful retrogressive discriminatory effect in the opinion of said office, and from the City's first-hand involvement in the matter, any change in the Attorney General's position was not going to occur. The litigation alternative available in the District Court of Columbia often takes years to conclude in these type cases, and given the circumstances, the City

would inevitably fail in a quixotic pursuit at extreme financial cost. The Supreme Court has ruled that the Attorney General's interpretation of the Voting Rights Act is entitled to considerable deference. Board of Commissioners of Sheffield, 435 U.S. at 131, 98 S. Ct. at 979; Hampton County, 470 U.S. at 178-179, 105 S. Ct at 1135; City of Pleasant Grove, 479 U.S. at 468, 107 S. Ct. at 798. There might never be an election if the petitioners' suggested course were followed.

The City acted responsibly in holding the regularly scheduled election pursuant to State law. The City will certainly assign the petitioners to a council ward, perhaps a redefined Ward 1, as soon as the 2000 census figures are completed and a suitable plan is accepted by the Attorney General. Although the petitioners demand voting participation in the presently configured Ward 1, the City made extensive efforts to have such approved, and considering the facts and obstacles, it is evident that such would not have occurred. It is presumed that a municipality exercises its authority in a proper and legal manner, Chadwick v. Town of Hammondville, 270 Ala. 618, 120 So. 2d 899 (1960), and courts will not review the wisdom or advisability of discretionary acts vested in the governing body. City of Prichard v. Moulton, 277 Ala. 231, 168 So. 2d

602 (1964).

Thus, the petitioners did not have the right to vote in the recent city council election without the U. S. Attorney General having granted preclearance of the voting change, and the election was properly conducted by the City.

II. THE SUPREME COURT OF ALABAMA DID NOT VIOLATE FEDERAL LAW IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF THE PETITIONERS' LAWSUIT.

As previously shown herein, federal law is absolutely clear that the City of Alabaster could not permit the petitioners to vote in the August 22, 2000 council election. The U.S. Attorney General objected to the City's submission, and preclearance approval is required before a voting change is legally permissible. The trial Court could not grant the relief sought by the petitioners in their prayer for relief. The trial Court could not nullify the election results and order a recount to include unprecleared Weatherly voters. The votes of the unprecleared Weatherly voters would not be "legal votes" for the City, or the Court, to consider.

Persons living in unprecleared areas do not have a right to vote in the applicable political subdivision of jurisdictions to which the

Voting Rights Act applies until preclearance is granted, i.e., unless either the U.S. Attorney General or the District Court for the District of Columbia concludes that the proposed voting changes are non-discriminatory in intent and effect. The Voting Rights Act, and the interpretation thereof by the United States Supreme Court, freezes each covered jurisdiction's election procedures until the applicable federal instrumentality determines the change will be non-discriminatory. Board of Commissioners of Sheffield, 435 U. S. at 121, 98 S. Ct. at 974; Reno v. Bossier Parish School Board, 520 U. S. 471, 477-478, 117 S. Ct. 1494, 1497, 137 L. Ed 2d 730 (1997). There have been no federal or state law violations. There obviously would have been federal and state violations if the City (l) had not complied with the Section 11-46-21 (a), Ala. Code 1975, and not held the election, and instead simply perpetuated the terms of the incumbents by further challenging the Attorney General's decision when the likelihood of success was extremely remote, or (2) had allowed the petitioners to vote without preclearance.

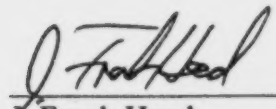
The Circuit Court was justified in exercising Rule 41 (2) of the Alabama Rules of Civil Procedure to dismiss the case. The Supreme Court of Alabama correctly affirmed the trial court's ruling in its

interpretation of federal law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX A -- OPINION OF THE SUPREME

COURT OF ALABAMA RELEASED

NOVEMBER 9, 2001

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1000093

Brenda 0. Singer et al.

v.

City of Alabaster et al.

Appeal from Shelby Circuit Court
(CV-00-850)

BROWN, Justice.

Brenda 0. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon (collectively referred to herein as "the plaintiffs") appeal from the Shelby Circuit Court's dismissal of their lawsuit contesting the

results of the August 22, 2000, municipal election for the position of Ward 1 council member for the City of Alabaster ("the City"). We affirm.

Facts and Procedural History

The City is governed by a mayor, who is elected by a citywide vote, and seven city council members, who are elected by voting districts or "wards." The City's population is predominantly white; according to the 1990 Federal decennial census, only 1,617 of the City's 14,732 residents are African-American.

In 1991, the City adopted a redistricting plan for its seven wards to reflect annexations and natural population increases. On December 30, 1991, the City obtained "preclearance" from the United States Attorney General ("the Attorney General") for its redistricting plan, as well as for its mayor-council form of government and its recent annexations, as required by § 5 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973c. Section 5 provides, in pertinent part, that covered jurisdictions (of which Alabama is one) may not enforce

any change affecting voting without first receiving a preclearance determination from the Attorney General finding that the proposed change is not racially discriminatory in purpose or effect. Under the City's precleared redistricting plan, the population in one of the City's seven wards would be predominantly African-American, while the population in the remaining six wards would be overwhelmingly white. The City's precleared plan also provided that pursuant to §§ 11-46-20 and -21, Ala. Code 1975, nonpartisan municipal elections were to be held on the fourth Tuesday in August in those years in which there was a Presidential election.

Since the 1991 preclearance, the City has approved 58 new commercial and residential annexations. Two of those annexations were of areas in which the plaintiffs resided at the time of the August 22, 2000, municipal election. Those two annexations were within a broader area known as the Weatherly subdivision, an area where the population is predominantly white. After it annexed an area, the City assigned the annexed area to a ward; the areas of the plaintiffs' annexations were both assigned to Ward 1, the only ward in which the

population was predominantly African-American.

On May 31, 2000, the City sought preclearance from the Attorney General for its annexations and ward assignments made after the 1991 preclearance. On July 10, 2000, the Attorney General precleared all of the City's commercial annexations, but requested additional information as to population statistics, demographic shifts, and election data regarding the City's residential annexations. The City responded, but the Attorney General considered its answers to be incomplete. The Attorney General nevertheless recognized the need for an expedited decision because of the impending August 22, 2000, elections. Accordingly, the Attorney General issued an order preclearing all of the annexations, but not all of the ward assignments. Specifically, the order refused preclearance for the assignment of the plaintiffs' two annexed areas to Ward 1, stating that assigning those annexed areas to Ward I diluted the African-American vote in that ward and, thus, defeated the goal of the Voting Rights Act of 1965. The City immediately notified the Attorney General, in a letter dated August 17, 2000, that it would comply with the preclearance order by

not counting the votes from these two annexed areas in the Ward I city-council race. The City also advised the Attorney General that it was unable to print new ballots for the two unprecleared annexed areas to Ward 1 before the upcoming election; however, it informed the Attorney General that it would accommodate the preclearance issue by having the voters in the two unprecleared annexed areas of the Weatherly subdivision vote at separate polling sites for the Ward 1 city-council election, thereby segregating their votes from the rest of the precleared Ward I electorate so that their votes for the Ward 1 council member would not be counted.

The City held its municipal election on August 22, 2000, as planned. The Ward I city-council election involved a contest between Bobby Lee Harris, the incumbent, and Todd Goode, the challenger. In the precleared areas of Ward 1, Harris, an African-American, garnered 326 votes, while Goode, who is white, garnered 287 votes. A total of 103 ballots were cast in areas included in the two Weatherly subdivision annexations. All of the ballots included votes for mayor and all but two ballots included votes for Ward 1 city council.

Pursuant to the City's promise to comply with the Attorney General's preclearance order, the City counted all the Weatherly subdivision votes for mayor but disallowed the votes in the two annexed areas for Ward 1 city council. The record suggests that all of the 101 votes cast in the Ward 1 city-council election by those residents in the Weatherly subdivision annexed areas were cast for Goode. Had those votes been counted, Goode would have won the race with 388 votes.

On August 28, 2000, the plaintiffs, who are among the 101 Weatherly subdivision voters whose ballots were not counted in the Ward 1 city-council election, sued the City, Steve Rauch (the mayor of the City of Alabaster), and Harris in the Shelby Circuit Court contesting the election result favoring Harris. The plaintiffs contended that disallowing their votes in the Ward 1 city-council election violated their federal and state constitutional rights to equal protection and their right to vote, guaranteed by § 2 of the Voting Rights Act of 1965. The plaintiffs asked the circuit court to nullify the results of the election, or, alternatively, to order that the Weatherly subdivision votes from the two annexed areas be counted in the Ward 1 city-council election.

The defendants filed motions to dismiss, arguing that state courts lacked subject-matter jurisdiction over the case under § 5 of the Voting Rights Act of 1965. The circuit court agreed, holding that it could not fashion a remedy without "disregarding . . . clearly established federal law." The circuit court subsequently dismissed the case, and the plaintiffs appealed.

Discussion

The question presented in this appeal is whether the circuit court erred in dismissing the plaintiffs' action for lack of jurisdiction.

Under our federal system, state courts and federal courts are presumed to have concurrent jurisdiction over cases arising under federal law. Congress, however, may confer upon federal courts exclusive jurisdiction by means of an exclusive statutory directive. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) Congress has pronounced that only federal courts can entertain "[a] ny action under this section [§ 5 of the Voting Rights Act]." 42 U.S.C. § 1973c. Accordingly, this Court, observing its constitutional duty to recognize the supremacy of federal law, has held that "cases involving

the interpretation of the preclearance requirements of Section 5 of the federal Voting Rights Act are within the exclusive jurisdiction of the federal courts." Mitchell v. City of Prichard, 538 So. 2d 1, 2 (Ala. 1988). The dispositive question in the present case is whether the plaintiffs' action "arises under" § 5, thereby divesting state courts of jurisdiction.

The plaintiffs maintain that their action is an election contest, at the heart of which is a claim that they were unconstitutionally denied the right to vote in the August 22, 2000, Ward 1 election.[1] They argue that any nexus their claim may have with § 5 of the Voting Rights Act is merely incidental and, thus, does not prevent the Shelby Circuit Court from exercising jurisdiction. In so arguing, the plaintiffs assert that their cause of action accrues under state election laws rather than under § 5 of the Voting Rights Act.

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[1]In their complaint contesting the August 22, 2000, election, the plaintiffs claim that the City deprived them of their constitutional right to vote when it proceeded with the August 22, 2000, election before it obtained preclearance for the inclusion in Ward I of the areas annexed into the Weatherly subdivision.

The actual source of the plaintiffs' right to bring an action, however, is not necessarily determinative of the question whether their lawsuit "arises under" § 5. It is true that "[o]rdinarily, '[a] suit arises under the law that creates the cause of action.'" Hudson Ins. Co. v. American Elec. Corp., 957 F.2d 826, 828 (11th Cir. 1992) (quoting American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)). There are many instances, however, where claims brought under the color of state law nevertheless raise federal questions, thereby conferring upon federal courts subject-matter jurisdiction. As to these situations, the United States Supreme Court has said that federal subject-matter jurisdiction exists where the plaintiff's right to relief "depends on resolution of a substantial question of federal law." Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1, 28 (1983). We believe that federal-question jurisprudence extends to the present case, where state jurisdiction can exist only if a full adjudication of the plaintiffs' lawsuit is possible without consulting § 5.

The plaintiffs, in filing this election contest, have sought to

nullify the results of the Ward 1 City-council election so that one of two remedies requested in their complaint can be ordered. Accordingly, in addition to nullification, the plaintiffs have.asked the Shelby Circuit Court either (1) to conduct a recount of all votes cast in the Ward 1 election, including those votes from the annexed areas of the Weatherly subdivision that were originally excluded, or (2) to delay a second Ward 1 election indefinitely, pending the assignment of the allegedly disenfranchised Weatherly subdivision voters to a ward that has been precleared.

As to the first remedy the plaintiffs requested, the United States Supreme Court has clearly foreclosed the option of counting votes from unprecleared areas. In Clark v. Roemer, 500 U.S. 646 (1991), a federal district court in Louisiana permitted state judicial elections to go forward and allowed the winners of the elections to take office, even though the Attorney General had interposed valid objections to the election process for the judgeships. The Supreme Court, reversing the district court, held that "§ 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the

election." Clark, 500 U.S. at 654.

In the present case, the Attorney General has likewise interposed an objection, refusing to preclear the City's inclusion in Ward 1 of the areas annexed in the Weatherly subdivision. Any remedy authorizing a recount to include votes from these unprecleared areas would necessarily contravene the Attorney General's objection. Therefore, ordering this remedy would effectively overturn the Attorney General's preclearance adjudication, something that § 5 allows only federal courts to do.

The second remedy the plaintiffs requested, which involves nullifying the Ward 1 election and delaying a second vote until the City has obtained preclearance, likewise directly involve the application of § 5. In Allen v. State Board of Elections, 393 U.S. 544 (1969), Chief Justice Warren, writing for the Court, observed:

> "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. . . . [T]he Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. § 1973l (c) (1) (1964 ed., Supp. I). See Reynolds v. Sims, 377 U.S. 533, 555 (1964). . . .

> "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."

Allen, 393 U.S. at 565-66 (footnote omitted).

The Supreme Court later addressed the postponement of elections in NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985). In that case, several residents of Hampton County, South Carolina, and the NAACP, a civil rights organization, sued the Hampton County election commission and several other related defendants, seeking to enjoin a school-board election as illegal under § 5. The plaintiffs alleged that several election procedures had been changed, but had not been precleared, including the scheduled date of the school-board election.

Ironically, the election commission's decision to change the date of the school-board elections was the result of an attempt by the commission to comply with § 5. The commission changed the date of the school-board elections after the Attorney General had precleared a previously-submitted election plan. The preclearance of that plan by the Attorney General had the effect of nullifying an election previously

held under the prior election rules. Therefore, in an effort to implement the new precleared plan, the commission scheduled a second election to occur on a special date. The federal three-judge panel held that, although implementation of the new election plan was a change under § 5, "the scheduling of the election and the filing period were simply 'ministerial acts necessary to accomplish the statute's purpose . . ., and thus did not require preclearance.'" Hampton County, 470 U.S. at 174. On appeal, the Supreme Court reasoned that its inquiry in § 5 cases was not whether the implemented election-procedure changes were actually discriminatory, but "whether the challenged alteration has the potential for discrimination." Id. at 181. Justice White, writing for the Court, concluded that changing the date of an election had such potential, and the Supreme Court reversed the lower court. The Court held that changes regarding the date of an election -- even when those changes affect only a single election cycle -- require preclearance. Id.

In the present case, we are unable to afford the plaintiffs the relief they request without doing violence to § 5. The United States

Supreme Court has made it clear that state courts, when considering a remedy altering an election process, must defer to the preclearance mandate of § 5. Specifically, the Court has said, "When a party to a state proceeding asserts that § 5 renders the contemplated relief unenforceable, therefore, the state court must examine the claim and refrain from ordering relief that would violate federal law." Hathorn v. Lovorn, 457 U.S. 255, 269-70 (1982). We are therefore confronted with a situation where we must make a § 5 preclearance adjudication before granting the plaintiffs their requested relief, or, indeed, any other relief with respect to the City's election procedures, something that § 5 clearly precludes our doing. For the same reason that state courts are powerless to grant relief to the plaintiffs, state courts are without jurisdiction to entertain the merits of the plaintiffs' claim, because a full adjudication -- which, of course, includes the possibility of granting relief -- requires consideration of a substantial question of law under § 5.

Conclusion

For the foregoing reasons, we affirm the Shelby Circuit Court's

judgment of dismissal for lack of jurisdiction.

AFFIRMED.

See, Johnstone, Woodall, and Stuart, JJ., concur.

Lyons and Harwood, JJ., concur specially.

Moore, C.J., and Houston, J., dissent.

LYONS, Justice (concurring specially).

Under § 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), a few states, including Alabama, are prevented from enforcing changes affecting voting practices without first obtaining approval from the Federal government. I believe that Justice Black was right when he dissented from the United States Supreme Court's upholding the validity of § 5 against constitutional attack in South Carolina v. Katzenbach, 383 U.S. 301 (1966). Justice Black, in his dissent, made the following observations:

> "My second and more basic objection to § 5 is that Congress has here exercised its power under § 2 of the Fifteenth Amendment through the adoption of means that conflict with the most basic principles of the Constitution. . . . Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional

structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless. . . . Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not like is in direct conflict with the clear command of our Constitution that 'The United States shall guarantee to every State in this Union a Republican Form of Government.' I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. . . . A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result.

"I see no reason to read into the Constitution meanings it did not have when it was adopted and which have not been put into it since. The proceedings of the original Constitutional Convention show beyond all doubt that the power to veto or negative state laws was denied Congress. On several occasions proposals were submitted to the convention to grant this power to Congress. These proposals were debated extensively and on every occasion when submitted for vote they were overwhelmingly rejected. The refusal to give Congress this extraordinary power to veto state laws was based on the belief that if such power resided in Congress the States would be helpless to function as effective governments. Since that time neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest

> indication of a purpose to grant Congress the power to veto state laws either by itself or its agents. Nor does any provision in the Constitution endow the federal courts with power to participate with state legislative bodies in determining what state policies shall be enacted into law. The judicial power to invalidate a law in a case or controversy after the law has become effective is a long way from the power to prevent a State from passing a law. I cannot agree with the Court that Congress--denied a power in itself to veto a state law--can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases--they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval."

Id. at 358-61 (footnote omitted).

As the majority points out, the United States Supreme Court has interpreted § 5's proscription against changes in state law without advance federal approval to bar a state court from ordering relief that would otherwise require preclearance if such action were taken by any other branch of state government. Hathorn v. Lovorn, 457 U.S. 255, 269-70 (1982). Under Hathorn, the approved practice requires submission of the claim for relief to the Attorney General before application is made to the court. The Court observed:

> "Our holding does not prevent state courts from attempting to accommodate both state and federal interests.

> A state court, for examples might adopt the approach followed by the Chancery Court in this case, and order the parties to submit the proposed relief to the Attorney General. If the Attorney General registers an objection, the court might then order the parties to seek a declaratory judgment from the District Court for the District of Columbia."

Id. at 270 n.24 (emphasis added).

On the record before us, there is no indication that the request for a court-ordered stay of the election has received federal approval pursuant to § 5.

While I share the angst expressed in Justice Houston's dissenting opinion, criticism of the result in this case should, I respectfully submit, be directed to Congress.

Harwood, J., concurs.

HOUSTON, Justice (dissenting).

I would grant the second remedy requested by the plaintiffs and nullify the Ward I election and delay a second election to fill the Ward 1 council seat until the City has obtained preclearance from the Civil Rights Division of the Justice Department. The very idea that this Court by its opinion deprives 101 registered voters, who voted, of their

right to vote to keep from doing violence to § 5 of the Voting Rights Act of 1965, offends my sense of truth, justice, and the American way.

APPENDIX B -- ORDER OF THE CIRCUIT COURT OF SHELBY COUNTY

DATED SEPTEMBER 22, 2000

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA
EIGHTEENTH JUDICIAL CIRCUIT

Brenda 0. Singer, Patsy H. Cannon, Gwen Dill, and John D. Harmon

Plaintiffs,

CASE NO. CV-00-850

v.

City of Alabaster, an Alabama municipal corporation; Steve Rauch, in his official capacity as Mayor of the City of Alabaster; and, Bobby Lee Harris

Defendants.

ORDER

This cause is presently before the Court on the plaintiffs' complaint to contest the municipal election in the City of Alabaster held August 22, 2000. The allegation of the complaint is that the plaintiffs were denied the right to vote in the Ward I City Council

election, disenfranchising them in violation of their Constitutional and statutory rights. The plaintiffs seek to nullify the election of Bobby Lee Harris as Councilman for Ward 1 of the City of Alabaster.

Also pending before the Court is a motion to dismiss this cause filed on behalf of Bobby Lee Harris, the City of Alabaster, and Steve Rauch in his official capacity as Mayor of Alabaster; hereinafter collectively referred to as defendants. The Court has also allowed the Attorney General of the United States, hereinafter referred to as the Attorney General, to participate in these proceedings as amicus curiae.

It is undisputed among the parties and participants that the election at issue is subject to the jurisdiction of § 5 of the Voting Rights Act of 1965. See Perkins v. Matthews, 540 U.S. 379 (1971).

Specifically, no new voting practice is enforceable unless preclearance is obtained from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. §1973c. "Congress designed the preclearance procedure 'to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process'" Lopez v. Monterey County,

California, 519 U.S. 9 (1996). "Congress chose to accomplish this purpose by giving *exclusive authority* to pass on the discriminatory effect or purpose of an election change to the Attorney General and to the District Court for the District of Columbia." Id. (Emphasis added). See also McDaniel v. Sanchez, 452 U.S. 130 (1981). By obtaining judicial preclearance, a covered jurisdiction, like the City of Alabaster, may obtain from the United States District Court for the District of Columbia, a declaratory judgment that the voting change would not have the purpose or effect of denying or abridging the right to vote on account or race or color. Clark v. Roemer, 500 U.S. 646 (1991).

In the instant case, the City of Alabaster sought preclearance from the Attorney General concerning the annexation of several tracts of land located in the Weatherly subdivision in the City of Alabaster. In addition to seeking approval of the annexation for mayoral purposes, the City also sought preclearance to place the annexed tracts in Ward I for purposes of City council representation. The City obtained preclearance for mayoral purposes; however, the Attorney General specifically refused to grant preclearance for the placement of

the Weatherly tract Ward 1. Specifically, the Attorney General determined that the City failed to carry "its burden of showing that the designation of Ward 1 has neither a discriminatory purpose nor a discriminatory effect." (August 16, 2000 letter from the U. S. Department of Justice to the City Attorney). The Attorney General further determined that the residents of the annexed portions of the Weatherly subdivision could vote in the mayoral race but, **could not** vote in the Ward I City Council race. Id

The relief sought by the plaintiffs in this cause, specifically to nullify the election of the City Councilman for Ward 1, to conduct a re-count of the votes cast in the Ward I City Council election and to grant a preliminary injunction to enjoin the filing of the office of Ward I Councilman would only be available through disregarding the clearly established federal law. A state court must not order relief that violates federal law. Hathorn v. Lovorn, 457 U.S. 255 (1982). The Alabama Supreme Court has held that "cases involving the interpretation of the preclearance requirements of Section 5 of the [F]ederal Voting Rights Act are within the exclusive jurisdiction of the federal courts."

Mitchell v. City of Prichard, 538 So. 2d 1 (Ala. 1988). While the Court is not unsympathetic to the plight of the plaintiffs in that they were unable to cast legal votes in the race for Ward 1 City Council representative[1] for the reasons set out previously in this Order, it is without authority to rule otherwise.

Accordingly, the plaintiffs' request for preliminary injunctive relief, as well as any and all other relief sought is hereby **DENIED**. Further, the defendants' motion to dismiss is due to be, and is hereby **GRANTED**.

DONE AND ORDERED on this the day of [22nd] day of [September], 2000.

/S/
D. Al Crowson
Circuit Judge

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[1]which Mr. Edward Still, counsel for Defendant, Bobby Harris concedes"...(for the purposes of the Motion to Dismiss and Motion for Preliminary Injunction) that all ninety-three (93) votes from the newly- annexed Weatherly residents were cast for Mr. Goode." See letter from Edward Still dated September 21, 2000. Mr. Goode was Bobby Harris' opponent.